UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN O'ROURKE,

Plaintiff,

- against-

03 Civ. 4395 (KMW)

SMITHSONIAN INSTITUTION PRESS and
THE SMITHSONIAN INSTITUTION,

Defendants.

WOOD, U.S.D.J.

Kevin O'Rourke, pro se, commenced this copyright infringement action against the Smithsonian Institution Press pursuant to the Federal Copyright Act of 1976, 17 U.S.C. 101, et seq. Defendant Smithsonian Institution Press moved to dismiss the complaint for lack of subject matter jurisdiction. See FED. R. CIV. P. 12 (b) (1). Along with Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, plaintiff included an Amended Complaint that added The Smithsonian Institution as a co-defendant. The Court accepted plaintiff's Amended Complaint, but notes The Smithsonian Institution Press's position that the addition of The Smithsonian Institution as a defendant does not cure this Court's alleged lack of subject matter jurisdiction. See Reply Memorandum of Law in Further Support of the Defendant's Motion to Dismiss, filed October 16, 2003, at 2 n.2. For the reasons set forth below, the court holds that it lacks subject matter juristiction in this matter, and thus dismisses this suit.

I. Background

Plaintiff alleges in his Amended Complaint that he authored an original book entitled Currier and Ives: The Irish in America for which he owns a protected copyright. Plaintiff alleges that this copyright was infringed by the Smithsonian Institution Press and The Smithsonian Institution when they published and marketed a book entitled Currier and Ives: America Imagined.

Defendant Smithsonian Institution Press moves to dismiss for lack of subject matter jurisdiction, arguing that the Court of Federal Claims has exclusive jurisdiction over copyright claims brought against the United States. See 28 U.S.C. 1498 (b). Plaintiff responds that defendants are independent entitles that do not fall within the term "United States" for purposes of 28 U.S.C. 1498 (b).

II. The Standard for Granting a Motion to Dismiss for Lack of Subject Matter Jurisdiction

In a motion to dismiss pursuant to Rule 12 (b) (1), "the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that (subject matter jurisdiction) exists." Luckett v. Bure, 290 F.3d 493, 496-97 (2nd Cir. 2002).

III. 28 U.S.C. § 1498 (b)

28 U.S.C. § 1498 (b) states, in relevant part:

> whenever the copyright in any work protected under the

> copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims... (emphasis added)

Defendants argue that the plain meaning of Section 1498 (b) supports a finding that defendants are "the United States" for purposes of the statute. Specifically, defendants argue that the phrase "United States" should be interpreted broadly to encompass a wide array of governmental entities, including the Smithsonian Institution Press and The Smithsonian Institution. Plaintiff construes that statute more narrowly, arguing that it is extremely "restrictive" of the jurisdiction of the Court of Federal Claims, and that it identifies a limited set of entities to which it applies.

Plaintiff's interpretation of the statute is clearly wrong. Plaintiff's interpretation would effectively read out of the statute the phrase "United States," and would instead limit the jurisdiction of the Court of Federal Claims to copyright actions brought against "corporations owned or controlled by the United States" and certain entities "acting for the government and with the authorization or consent of the government." Id. (quoting 28 U.S.C. § 1498 (b)). A plain reading of the statute indicates that the Court of Federal Claims has exclusive jurisdiction over copyright actions brought against the United States as well as those to which the plaintiff refers.

The only question before the Court, therefore, is whether The Smithsonian Institution, "a trust instrumentally of the United States," see Plaintiff's Amended Complaint at ¶ 3, and The Smithsonian Institution Press, "an operating unit of The Smithsonian Institution," see id. at ¶ 5, are "the United States" for purposes of Section 1498 (b).[1] If defendants are "the United States" for purposes of the statute, Section 1498 (b) grants exclusive jurisdiction over plaintiff's copyright claim to the Court of Federal Claims, and this Court must dismiss the present action for lack

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[1] Defendants do not contend that they fall within any category other than "the United States" for purposes of Section 1498 (b). The Court does not, therefore, consider plaintiff's argument that defendants are not "corporations," nor does the Court consider plaintiff's argument that defendants were not acting with the authorization of the government when it allegedly infringed plaintiff's copyright.

of subject matter jurisdiction.

The Court concludes that the phrase "the United States" should be interpreted broadly for purposes of Section 1498 (b). The language of the statute suggests Congress's intent to grant the court of Federal Claims exclusive jurisdiction over all copyright claims in which the United States was involved in the alleged infringement. That language provides for the Court of Federal Claims to have exclusive jurisdiction over not only all copyright claims against the United States, but also all claims against corporations owned or controlled by the United States and claims against various private entities "acting for the government and with the authorization or consent of the Government."

The only decision on the precise question of whether the Smithsonian Institution is included within the broad scope of "the United States" for purposes of Section 1498 (B) concluded that the Court of Federal Claims does have exclusive jurisdiction over copyright actions brought against the Smithsonian Institution. See Brundin v. United States, No. 95 Civ. 2689, 1996 WL 22370 (S.D.N.Y. Jan. 19, 1996). There, Magistrate Judge James C. Francis held that the Smithsonian Institution is an "instrumentality of federal government and, consequently, entitled to sovereign immunity." Id. At 9. Magistrate Judge Francis further held that the Court of Federal Claims has exclusive subject-matter jurisdiction over such claims, and dismissed plaintiff's copyright claims.

Like Section 1498 (b), The Tucker Act, 28 U.S.C. 1491, grants the Court of Federal Claims jurisdiction over certain claims against the United States. The Tucker Act gives the Court of Federal Claims "jurisdiction to render judgment . . . upon any express or implied contract with the United States . . . . " 28 U.S.C. § 1491 (a) (1) (emphasis added). The Court of Federal Claims has construed the term "the United States" for purposes of the Tucker Act to include the Smithsonian Institution and Smithsonian Institution Press. See Dolmatch Group, Ltd. V. United States, 40 Fed. Cl. 431 (Ct. C1. 1998). In Dolmatch Group, Ltd., the Court of Federal Claims exercised its jurisdiction under the Tucker Act in a contract dispute between the Dolmatch Group and the Smithsonian Institution. One question the court considered was whether the agent who allegedly entered into a contract with the Dolmatch Group was authorized by the Smithsonian Institution to enter into contracts upon its behalf. In considering this question, the court necessarily assumed that a valid contract between the Dolmatch Group and the Smithsonian Institution is a contract between the Dolmatch Group and the United States. See id. at 436 ("The primary question is whether a contract . . . came into existence between the [plaintiff] and the Smithsonian. A party alleging a contract with the United States must prove . . . ."). In providing the background

facts of the dispute, the court stated that the "Defendant [the United States] acted through the Smithsonian Institution Press, video division . . . ." Id. at 432 (emphasis added).

Judge Buchwald similarly concluded that the Smithsonian Institution is "the United States" for purposes of the Tucker Act. See Marlev v. Ibelli, 203 F. Supp. 2d 302 (S.D.N.Y. 2001). Although the Marlev case began solely as an action in tort filed against the plaintiff's former co-workers at the Smithsonian Institution, plaintiff later asked for leave to file an amended complaint adding contract claims against the United States arising out of the actions of employees on the Smithsonian Institution. See id. at 311-12. The court denied plaintiff's motion to leave to amend, holding that contract claims against the Smithsonian Institution are claims against the United States that are within the exclusive jurisdiction of the Court of Federal Claims. See id. at 312.

The Court notes that other decisions recognize the close relationship between the United States and the Smithsonian Institution. See Expeditions Unlimited Aquatic Enterprises, Inc. v. United States, 566 F.2d 289, 296 n.6 (D.C. Cir. 1977) (finding that the Smithsonian Institution is a "federal agency" for purposes of the Federal Tort Claims Act, primarily because of the "substantial federal funding and the important supervisory role played by government officials . . . "). Defendants claim, and plaintiff does not dispute, that 68% of the Smithsonian Institution's workforce is made up of federal employees, see Declaration of John E. Huerta, ¶ 5; that the Smithsonian Institution is represented by lawyers from the United States Department of Justice, see id. at ¶ 4; and that monetary judgments against the Smithsonian are paid from the United States Judgment Fund. See id.

IV. Conclusion

The Court holds that for the purposes of Section 1498 (b) defendants are included within the scope of the phrase "the United States." Section 1498 (b) grants the Court of Federal Claims exclusive jurisdiction over copyright claims brought against the United States. The Court thus lacks subject matter jurisdiction over plaintiff's claim. The Court grants defendant Smithsonian Institution Press's motion to dismiss as against both defendants. The Clerk of Court is directed to close this case. Any pending motions are moot.

SO ORDERED

Dated: New York
November 14, 2003

Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the parties.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2004

(Argued; October 13, 2004 Decided: February 16, 2005

Docket No. 04-0151-cv

KEVIN O'ROURKE

Petitioner

—V.—

SMITHSONIAN INSTITUTION PRESS and THE SMITHSONIAN INSTITUTION

Respondents

Before:

KEARSE and CALABRESI, *Circuit Judges,*
and RAKOFF, *District Judge**.

Appeal from a judgement of the United States District Court for the Southern District of New York, Kimba M. Wood, *Judge,* dismission copyright infrngemnte action for lack of jurisdiction on the ground that, under 28 U.S.C.

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* Honorable Jed. S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

§1498 (b),juristiction over such suits against the Smithsonian Institution and its operating units lies exclusively in the United States Court of Federal Claims. See 296 F.Supp2d 434 (2003).

Affirmed.

KEVIN O'ROURKE, Rockville Centre, New York *Plaintiff pro se.*

EMILY S. REISBAUM, Assistant United States Attorney, New York, New York (David N. Kelley, United States Attorney for the Southern District of New York, Meredith E. Kotler, Assistant United States Attorney, New York, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge:*

Plaintiff pro se Kevin O'Rourke appeals from a judgment of the United States District Court for the Southern District of New York, Kimba M. Wood, Judge, dismissing his amended complaint ("Complaint") against defendants Smithsonian Institution and its operating unit the Smithsonian Institution Press (collectively the "Smithsonian ") for copyright infringement. The district court granted the Smithsonian's motion to dismiss for lack of subject matter jurisdiction on the ground that 28 U.S.C. 1498 (b) gives the United States Court of Federal Claims exclusive jurisdiction over copyright infringement actions against "the United States", and that that phrase encompasses the Smithsonian. On appeal, O'Rourke contends that the Smithsonian should

not be considered "the United States" within the meaning of 1498(b). For the reasons that follow, we reject his arguments and affirm the judgment of the district court.

I. BACKGROUND

The Complaint alleges that, in the mid-1990's, O'Rourke wrote and published an original book entitled Currier Ives: The Irish and America (the "O'Rourke Book" or the "1995 Book") and that O'Rourke owns the United States copyright on the 1995 Book. (Complaint ¶¶ 7-10.) The Complaint alleges that in or about 2001, the Smithsonian, "a trust instrumentally of the United States"(Complaint ¶ 5), published a book entitled Currier and Ives:America Imagined (the "Smithsonian Book") and that sections of the Smithsonian Book" were largely copied from" the O'Rourke Book (Complaint ¶ 11).

The Smithsonian moved to dismiss the Complaint for lack of subject matter jurisdiction on the ground that the United States of Federal Claims ("Court of Claims") has exclusive jurisdiction over this action by reason of 28 U.S.C. § 1498 (b). That section provides that

> whenever the copyright in any work protected under the copyright laws of the United States shall be infringed *by the United States*, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Governement, *the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims . . .*

28 U.S.C.£ 1498 (b) (emphases added). The Smithsonian argued that it is within the term "the United States" as used in § 1498 (b).

In support of this contention, the Smithsonian submitted the sworn declaration of its general counsel describing its status and operations, along with a memorandum of law describing, inter alia, judicial treatment of the Smithsonian under other federal statutes. The general counsel's declaration stated, in pertinent part, as follows:

> 2. The Smithsonian Institution is a trust instrumentality of the United States established by Act of Congress in 1846, 20 U.S.C. § 41 et seq.
>
> 3. As such, the Smithsonian Institution reports annually to Congress on its budget and receives appropriations from Congress. Approximately two-thirds of the Smithsonian Institution's annual operating budget is derived from federal appropriations, with the balance provided by trust funds.
>
> 4. In addition, whenever legal actions are brought against the Smithsonian Institution, we are represented by lawyers form the United States Department of Justice. To the extent that monetary judgments are awarded against the United States for conduct of the Smithsonian Institution, those judgement are paid from the United States Judgment Fund.
>
> 5. The workforce of the Smithsonian Institution is largely made up of federal employees. Indeed, as of September 16, 2003, the Smithsonian Institution

> employed 4293 federal employees, which comprise approximately 68% of the Smithsonian Institution's workforce.
>
> 6. The Smithsonian Institution Press is an operating unit of the Smithsonian Institution and is fully-funded by the Smithsonian Institution. The Smithsonian Institution Press is not a separate and distinct legal entity independent of the Smithsonian Institution.

(Sworn declaration of John E. Huerta dated September 16, 2003 ("Huerta Decl."), ¶¶ 2-6.)

The Smithsonian's memorandum of law noted that the Smithsonian had been created by Congress in order to comply with the terms of a bequest to the United States (see Smithsonian Memorandum of Law in Support of the Defendant's Motion To Dismiss ("Smithsonian Memorandum") at 2-3 citing 20 U.S.C. § 41 note), and stated that

> all three branches of the federal government have a significant role in the operations of the Smithsonian Institution. Eight of the seventeen Regents of the Smithsonian Institution acquire their positions by virtue of holding high federal government office, and the remaining Regents are appointed by joint resolution of Congress. 20 U.S.C.§ 42.

(Smithsonian Memorandum at 3-4). Although nothing that no circuit court had considered whether the Smithsonian was within the term "United States" as used in 1498(b), the Smithsonian Memorandum cited one district court decision that had summarily answered that question in the affirmative, see *Brudin v. United States,* 1996 WL 22370, at *7-*8

(S.D.N.Y. Jan. 19 1996), and a number of circuit court opinions that had found the Smithsonian to be the "United States" or a federal agency for purposes of other federal statutes, see Part II.C. below. Pointing out that" "[t]he United States, as sovereign, is immune form suit except to the extent that it has consented to be sued" (Smithsonian Memorandum at 8, citing United States v. Sherwood, 312 U.S. 584, 586 (1941)), the Smithsonian noted that the United States has, in§ 1498(b), expressly waived its sovereign immunity form suit for copyright infringement only to the extent that such a suit may be brought in the Court of Claims. The Smithsonian argued that the district court thus lacked subject matter jurisdiction of the present action (id. At 8-9).

In opposition to the motion, O'Rourke did not dispute any of the factual assertions in the Huerta Declaration. Rather, he argued that§ 1498 (b) is inapplicable because the Smithsonian is not a corporation owned or controlled by the United States, or a contractor, subcontractor, person, firm, or corporation acting for the government, terms that are used in§ 1498(b); and he cited Dong v. Smithsonian Institution, 125 F.3d 877, 883 (D.C. Cir. 1997) cert. Denied, 524 U.S. 922 (1998), and Cotton v. Heman, 63 F.3d 1115 (D.C. Cir. 1995), for the proposition that the Smithsonian is not a federal agency. (See O'Rourke Memorandum of Law in Opposition to the Defendant[s'] Motion To Dismiss the Complaint ("O'Rourke Memorandum"), at unnumbered pages 2-6.) O'Rourke pointed out that the Smithsonian was created as an independent establishment of the United States, citing 20 U.S.C. § 41, and that£ 1498(b) does not mention establishments, or trust instrumentalities, of the United States. (See O'Rourke Memorandum at unnumbered page 3.)

In an opinion reported at 296 F.Supp.2d 434 (2003), the district court granted the Smithsonian's motion to dismiss. The court found O'Rourke's interpretation of § 1498(b) untenable because it "would effectively read our of the statue the phrase 'the United States.'" 296 F.Supp.2d at 435. Noting that the only questions before the court was whether the Smithsonian was within£ 1498(b)'s term "the United States" because" "[d]efendants do not contend that they fall within any [other] category" mentioned in section, 296 F.Supp.2d at 435 n.l. the district court answered that question in the affirmative. It reasoned that

> the phrase "the United States" should be interpreted broadly for purposes of Section 1498(b). The language of the statute suggests Congress's intent to grant the Court of federal Claims exclusive jurisdiction over all copyright claims in which the United States has sufficiently strong interest, or in which the United states was involved in the alleged infringement.

296 F.Supp.2d at 435-36. The court noted that most of the Smithsonian's workforces is made up of federal employees, that in litigation the Smithsonian is represented by attorneys from the United States Department of Justice, and that money judgments against the Smithsonian are paid out of the federal fisc. See id. At 437. The court also noted that other courts had recognized the close relationship between the United States and the Smithsonian, including "substantial federal funding and the important supervisory role played by government officials," id. At 436-37 (internal quotation marks omitted), and had concluded that the Smithsonian was a federal agency within the meaning of such statutes as the Tucker Act, 28 U.S.C. § 1346(a)(2), 1491, and the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-2680

("FTCA"). See F.Supp2d at 436-37. The district court concluded that the Smithsonian should be considered to be within the phrase "the United States" in£ 1498(b) and that the Court of Claims thus had exclusive jurisdiction over O'Rourke's claim.

Accordingly, judgment was entered dismissing the action for lack of subject matter jurisdiction, and the appeal followed.

II. DISCUSSION

On appeal, O'Rourke, who did not dispute the factual allegations in the Huerta Declaration, does not contend that there were any issues of fact to be tried with respect to jurisdiction. Rather, he contends principally that the Smithsonian should not be considered "the United States" within the meaning of£ 1498(b) beacause (a) it is a "trust instrumentality" and trust instrumentalities are not mentiond in that secion; (b) the Smithsonian, which describes itself as "independent of the government," see Official Guide to the Smithsonian at 26, has been held not to be a government agency for purposes of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the Privacy Act, 5 U.S.C. § 552a; and (c) in certain statues, Congress has expressly included the Smithsonian, from which O'Rourke infers that it is not covered by statues that do not expressly mention it. For the reasons that follow, we concluded that the district court correctly ruled that the Smithsonian is within the term "the United States" as used in£ 1498(b).

A. The Purpose of § 1498(b)

The Reports of the Judiciary Committees of both the Senate and the House of Representatives on the bill that led

to the enactment of£ 1498(b) noted that " '[I]t has long been and established principle that the Federal government should not appropriate private property without making just compensation to the owner thereof.' " S.Rep. No. 86-1877, at 2 (Aug. 22, 1960) ("Senate Report"), *reprinted in* 1960 U.S.C.C.A.N. 3444, 3445 (quoting H.R. Rep. No. 86-624 (July 1, 1960) ("House Report"). Thus,

> "[w]hen the Government deliberately publishes a copyrighted article without obtaining the prior consent of the copyright proprietor, the general assumption would be that the holder, pursuant to the principles of 'just compensation' under the fifth amendment of our Constitution, should be entitled to an action against the Government for infringement."

Senate Report at 3, *reprinted in* 1960 U.S.C.C.A.N. at 3445 (quoting House Report).

Prior to 1960, however, the United States had not waived its sovereign immunity from suits for copyright infringement, and the result was, "inequitabl[y]," that government employees–who could not claim sovereign immunity–were–" 'personally liable for copyright infringement'" that the employees had " 'done for the benefit of the Government.'" Id., reprinted in 1960 U.S.C.C.A.N. at 3446 (quoting House Report (other internal quotation marks omitted)). Finding it" " 'Proper... that the Government should assume responsibility for such acts,'" id., reprinted in 1960 U.S.C.C.A.N. at 3446 (quoting House Report), Congress enacted § 1498(b) to provide a limited waiver of sovereign immunity, allowing the United States to be sued in the Court of Claims for copyright infringement "in those cases in which the

infringement was made with the authorization or consent of the Government." Id. At 2, reprinted in 1960 U.S.C.C.A.N. at 3445.

Neither §1498(b) itself nor its legislative history expressly mentions the Smithsonian. As discussed below, however, the Smithsonian's creation, governance, and operations–including the facts that Congress appropriates funds expressly for the Smithsonian's preparation and publication of books and that judgments against the Smithsonian are paid form the United States Treasury –provide ample indicia that Congress intended£ 1498(b)'s reference to "the United States" to encompass the Smithsonian.

B. The Establishment and Operation of the Smithsonian

The Smithsonian has its origin in an 1829 bequest by the Englishman James Smithsonian, contingent on certain events that later came to pass, of his estate "to the United States of America." 9 Stat. 102, ch. 178 (Aug. 10, 1846) (the "1846 Act") (Preamble), codified at 20 U.S.C. § 41, note. The purpose of the bequest was the creation of "an establishment for the increase and diffusion of knowledge." Id.; see generally D. Currie, The Smithsonian, 70 U. Chi. L. Rev. 65, 65-66 (2003);"http://www.si.edu/archives/documents/sithsonwill.htm. In 1836, Congress authorized the President to pursue the bequest and to collect "all such sum or sums of money, or other funds, as may or shall be decreed or adjudged to the United States for, or on account of, said legacy." 5 Stat. 64 ch. 252, § 1(July 1, 1836) ("1836 Act"). The 1836 Act provided that "the Treasurer of the United States is hereby authorized and required to keep safely all sums of money or other funds which may be received by him in virtue of the said bequest, and to account therefor separately form all other

accounts of his office, and subject to such further disposal thereof as may be hereafter provided by Congress." Id.§ 2. The 1836 Act "pledged""the faith of the United States" to the application of those funds and moneys toward the purposes described in the bequest. Id.§ 3.

In the 1846 Act, Congress established the Smithsonian for the pursuit of those purposes, i.e., the increase and dissemination of knowledge. See 9 Stat. At 102 (Preamble). Ensuring governmental oversight, the 1846 Act provided that the persons who would "constitute [ ]... the 'Smithsonian Institution,"" i.e. be its members, would include high-ranking government officials, *ex offcio*, to wit, the President, Vice President, and Chief Justice of the United States, the Secretaries of State, the Treasury, War, and the Navy, the Postmaster-General, the Attorney-General, the Commissioner of the Patent Office, and the Mayor of the City of Washington. 1846 Act § 1, 9 Stat. At 102. The current codification similarly provides that those "constitut[ing]" the Smithsonian are""[t]he President, the Vice President, the Chief Justice, and the heads of executive departments." 20 U.S.C. § 41; see generally 5 U.S.C. § 101 (defining 14 "[e]xecutive departments," including the Departments of State, the Treasury, Commerce, and Education): 6 U.S.C. § 111 (making the Department of Homeland Security and executive department). Meetings of the members of the Smithsonian must be presided over by the President of the United States or, in absence, the Vice President, See 20 U.S.C. § 45.

The affairs of the Smithsonian are conducted by its 17-member board of regents, see id. § 42(a), eight members of which constitute a quorum for the conduct of business, see id. § 44. Eight of the regents are Unites States officials: the Vice President and the Chief Justice of the United States, see id. § 42(a), three United States Senators appointed by the

President of the Senate, see id. § 42(a), 43, and three Members of the United States House of Representatives appointed by the Speaker of the House, see id. § 42(a), 43. The remaining nine regents are "persons other than Members of Congress," id. § 42(a), who are appointed by joint resolution of Congress, see id. § 43. Regents are allowed reimbursement for their expenses in connection with attendance at meetings, but they receive no remuneration for their service are regents. See id. § 44 (Each member of the board['s]...service as regent shall be gratuitious."). The day-to-day operations of the Smithsonian are supervised by a salaried" "Secretary" chosen by the board of regents. Id. § 46, 48. More than two-thirds of the Smithsonian's workforce of some 6,300 persons are employees of the federal government. (See Huerta Decl. ¶5.)

In furtherance of its purpose of increasing and disseminating knowledge, the Sithsonian's operations include the publication of books. The Smithsonian operates its own fully-funded publishing arm, the Smithsonian Institution Press, which is a part of the Smithsonian Institution, rather than a separate legal entity. (See Huerta Decl. ¶ 6.) Operation of the Press is designed to "ensure that publications are well written, of exceptional scholarly quality, and accessible to general readers." Smithsonian Institution Budget Request to Congress for Fiscal Year 2004, at 128, available at http://www.si.edu/about/budget/2004/index.html ("Smithsonian 2004 Budget Request to Congress"). Congress has authorized "appropriations for," inter alia, the Smithsonian's "preparation of manuscripts...for publications." 20 U.S.C. § 53a.

In light of (a) United State's pledge of faith in the 1836 Act to create the Smithsonian with a view to increasing the dissemination ofknowledge, and (b) Congress's

appropriations to fund the Smithsonian's preparation and publication of manuscripts, we regard the Smithsonian's publishing activity as both authorized by the government and benefiting the government. Given Congress's enactment of£ 1498 (b) for the purpose of allowing copyright suits exclusively against "the United States" with respect to alleged infringements by works published with the authorization or consent of the Government or for the benefit of the Government, the inference is strong that Congress intended § 1498(b) to include the Smithsonian within the term "the United States"

That inference is further supported by the fact that most of the Smithsonian's operational expenses, and the judgements against it, are funded form the Unites states Treasury. The moneys bequeathed to the United States by Smithson, totaling $515,169, were place in the United States Treasury. See 1846 Act § 2,9 Stat. At102-103. Smithsonian operations were to be financed not from principal but from income on the bequeathed funds. See id. Currently, some two-thirds of the Smithsonian's annual operating budget is derived form federal appropriations. (See Huerta Decl. ¶ 3; cf. Smithsonian 2004 Budget Request to Congress, at 3, 125-26 (requesting more than $566 million in federal appropriations, including more than $9 million for "outreach" operations, which include operation of the Smithsonian Institute Press)). When money is required for payment of the Smithsonian's debts, the board of regents requests payments form the United States Treasury. See 20 U.S.C. § 57.

Whenever the Smithsonian is sued, representation is provided by government attorneys form the Department of Justice. (See Huerta Decl. ¶ 4.) If a money judgment is entered against the Smithsonian, the judgement is paid from

the United States Judgment Fund. (See id.) The Judgement Fund is Created by Congress's "appropiat[ion]" of "[n]ecessary amounts... to pay final judgments" (not otherwise provided for) entered under, inter alia, 28 U.S.C. § 2414 (judgments "against the United States" in the district courts), or 28 U.S.C. § 2517 (judgments "against the Unites States" in the Court of Claims). 31U.S.C. § 1304(a)(3). See also http://fms.treas.gov/judgefund/background.html ("As a general proposition, the Judgment Fund is available for payment of money judgements and awards against the United States..." The""permanent, indefinite""appropriation is found at 31 U.S.C. 1304."); http://fms.treas.gov/judgefund/reports.asp (showing that between October 2002 and December 2004, judgments against the Smithsonian totaling nearly $18 million were paid from the United States Judgment Fund).

In sum, Congress accepted the Smithson bequest to the United States and promised to established the Smithsonian for purposes of the increase and dissemination of knowledge; the Smithsonian thus engages in the publication of scholarly works; and Congress authorizes appropriations for most of the Smithsonian's operations, including its publishing operation. The persons responsible for the Smithsonian's operations are either United States officials of the highest rank, ex officio, or persons who are appointed by joint resolution of Congress; and most members of the Smithsonian's workforce are employees of the United States government attorneys; and judgements against the Smithsonian are paid from the Unites States Judgment Fund, with funds appropriated by Congress. In light of all these factors, we concluded that Congress intended "the United States" in § 1498(b) to encompass the Smithsonian.

C. Treatment of the Smithsonian Under Other Statues

O'Rourke's reliance on Dong v. Smithsonian Institution, 125 F.3d 877, and Cotton v. Heman, 63 F.3d 1115, for the contrary proposition is misplaced. Dong v. Smithsonian Institution, involved a claim under the Privacy Act, 5 U.S.C. § 552a. That statute, incorporating the definition of "agency" used in FOIA, defined "agency" as and ""executive department, military department, Government corporation, Government controlled corporation or other establishment in the executive branch of the Government (including the Executive Office of the President), or an [ ] independent regulatory agency," 5 U.S.C. § 552(f)(FOIA), see 5 U.S.C. 552a(a)(1); the Privacy Act was also understood to encompass any "authority of the government of the United States," 5 U.S.C. § 551(1), i.e. the definition of agency in the Administrative Procedure Act ("APA"), as the APA definition was incorporated into the FOIA definition, see Dong v. Smithsonian Institution, 125 F3d at 878-79; Cotton v. Heyman, 63 F.3d at 1121. In *Dong*, the District of Columbia Circuit observed that the only § 552(f) categories into which the Smithsonian could possibly fit were "establishment in the executive branch" and""Government controlled corporation." Neither was applicable. Given, inter alia, that all but two members of the Smithsonian's board of regents are either members of Congress or appointed by joint resolution of Congress, and there being no indication that the Smithsonian's Secretary reports to the President or that the Smithsonian engages in any typically executive activity other than with respect to its own buildings, the court concluded that the Smithsonian cannot be considered and establishment in the executive branch. See 125 F.3d at 879. The possibility that the Smithsonian might be considered a "Government controlled corporation" within the meaning of § 552(f) was rejected for

the same reason, because the court interpreted § 552(f)'s phrase'"or other establishment in the executive branch" (emphasis added) as revealing that the list of entities preceding that phrase referred only to corporations in the executive branch. See 125 F.3d at 879-80. The Dong court also found that the Smithsonian should not be considered an" "authority of the Government of the United States" within the meaning of the APA, 5 U.S.C. § 551(1) because, despite its substantial ties to the federal government, the Smithsonian does not have the power to exercise "substantial independent authority," id. At 881, "to take final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication," id. (internal quotation marks omitted).

In Cotton v. Heyman, the District of Columbia Circuit was faced with a plaintiff's motion for attorneys' fees against the Smithsonian in an action brought under FOIA. The district court had ruled that the Smithsonian was in fact an agency subject to FOIA; and the Smithsonian had then proceeded to deliver two of the demanded documents to the plaintiff, rather than attempting an immediate appeal of the district court's ruling. The court of appeals ruled that, as a result, the Smithsonian was estopped from challenging the ruling that it was an agency subject to FOIA. See 63 F.3d at 1118-19. However, that court concluded that the Smithsonian was not estopped from opposing an award of attorneys' fees on the ground that its position that it was not an agency subject to FOIA was "reasonable [ ]," and the court concluded that the position was reasonable in light of the definitions of" "agency" found in FOIA and the APA (which we have discussed above). See id. At 1119-21.

In light of the definition of "agency" in FOIA and the Privacy Act, the decisions in Dong and Cotton, analyzing that particular definition, provide little assistance in interpreting 1498(b)'s use of the term "the United States."

With respect to claims under other statutes, courts have similarly been constrained by the particular definitions before them. In employment discrimination actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000et seq. ("Title VII"), for example, the Smithsonian was considered to be part of the federal government but was held not encompassed by Congress's 1972 limited waiver of sovereign immunity, which extended only to claims against certain "executive agencies as defined in section 105 of title 5", 42 U.S.C. 2000e-16(a) (1994) (emphasis added), or against other listed entities that did not include the Smithsonian, see id. See generally Misra v. Smithsonian Astrophysical Observatory, 248 F.3d 37, 39-40 & n.1 (1st Cir. 2001). The Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. ("Rehabilitation Act"), as amended in 1978, had the same scope, as it incorporated 2000e-16(a) in describing the governmental entities against which claims could be asserted under that Act, see 29 U.S.C. 749a. Thus in addressing Rehabilitation Act claims in Rivera v. Heyman, 982 F.Supp. 932 (S.D.N.Y. 1997) ("Rivera I"), affirmed in part, reversed in part in light of 1998 amendment to statute, 157 F.3d 101 (2d Cir. 1998) ("Rivera II), the district court ruled, for reasons paralleling those discussed in Dong, that the Smithsonian could not be considered an "executive" agency, and hence could not be sued under the Rehabilitation Act. See Rivera I, 982 F.Supp at 938.

In 1998, the Smithsonian became amendable to suit under employment discrimination laws such as Title VII and the Rehabilitation Act by virtue of the passage of the Workforce

Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936, 341 (1998) ("Workforce Act"). See, e.g., Rivera II, 157 F.3d at 103; Misra v. Smithsonian Astrophysical Observatory, 248 F.3d at 39-40. Amending 42 U.S.C. 2000e- 16 entitled "Employment by Federal Government", the Workforce Act waived sovereign immunity with respect to actions against the Smithsonian under Title VII and the Rehabilitation Act by adding "the Smithsonian Institution" to the list of entities in 2000e16(a) that are prohibited from engaging in the forbidden discrimination, see Pub. L. No. 105-220, 112 Stat. 936, 341(a). See also id. 341(b) (making the Smithsonian amendable to suit under the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. ("ADEA"), by adding""the Smithsonian Institution" to the entities listed in subsection (a) of 29 U.S.C. 633a, which prohibits "[ ]discrimination on account of age in Federal Government employment").

The fact that the Smithsonian was not considered to be covered by 42 U.S.C. 2000e- 16(a) and 29 U.S.C. § 633a(a) prior to 1998 because it was not mentioned in those sections does not reflect an affirmative conclusion by the courts that Congress meant not to include it, but rather reflects the courts' application of the well established principle that waivers of sovereign immunity are to be construed strictly and narrowly in favor of the sovereign, see generally Lane v. Pena, 518 U.S. 187, 195 (1996).

In any event, these cases are not particularly helpful here, as they involved definitions that do not parallel the term "the United States" in 1498(b). Common to the cases deciding whether the Smithsonian was immune from suit, however, was the premise that the Smithsonian is properly considered part of the United States Government, a premise seemingly

endorsed by Congress's placement of the Smithsonian in the Title VII and ADEA sections governing employment by the "Federal Government."

That premise is likewise present in cases applying the FTCA, 28 U.S.C.§1346(b), 2671-2680, to tort claims against the Smithsonian. The jurisdictional provision of the FTCA, like 1498(b)(1), and the courts that have considered the issue have uniformly treated the Smithsonian as covered by the FTCA, see e.g., Johnson v. Smithsonian Institution, 566 F.3d 180, 189 (2d Cir. 1999); Genson v. Ripley, 681 F.2d 1240, 1241-42 (9th Cir. 1982); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, 296 (D.C. Cir. 1977) (panel opinion reprinted as appendix to opinion en banc), cert. denied, 438 U.S. 915 (1978); Marley v. Ibelli, 203 F.Supp.2d 302, 308-09 (S.D.N.Y. 2001); Brundin v. United States, 1996 WL 22370, at *8. In each of these cases, the focus was not principally on the initial jurisdictional provision in 1346(b)(1) but rather was on the substantive scope of the FTCA's waiver, see e.g., Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d at 296-97 (2680(h)'s exclusion of claims for libel), or on the procedural requirements set forth in other sections of the FTCA that limited the government's waiver of sovereign immunity, such as 28 U.S.C. 2679(d)'s restrictions on the removal of actions from state court, see *Marley v. Ibelli*,203 F.Supp.2d at 308-09, or § 2675's requirement that administrative remedies be exhausted, *see* Genson v. Ripley, 681 F.2d 1240, 1241-42 (9th Cir. 1982),and be exhausted within the time provided for FTCA claims in 28 U.S.C. 2401(b), see e.g., id.;id.; Johnson v. Smithsonian Institution, 189 F.3d at 189. In Johnson, for example, this Court considered whether the FTCA claimant had timely exhausted

his administrative remedies by presenting his claim to the appropriate federal agency. We noted that

> (t)he Federal Tort Claims Act, 28 U.S.C. 2671 et seq., which waives the United States' sovereign immunity against certain claims sounding in tort, governs the plaintiff's claims against the Smithsonian . . . . In order to state a claim under the FTCA, the person attempting to assert it must comply with several strictly construed prerequisites(,including) . . . "present(action) in writing to the appropriate Federal agency within two years after such claim accrues . . . ."

189 F.3d at 189 (quoting 28 U.S.C. 2401 (b)) (emphases ours). We found the Smithsonian to be a federal agency because it falls within the FTCA definition of that term, which""includes . . . independent establishments of the United States," 28 U.S.C. 2671. See 189 F.3d at 189.

We note that in none of these cases would the FTCA provisions in e.g., 2675 or 2680 have been triggered if the Smithsonian were not properly considered to be "the United States" within the meaning of 1346(b). Even so, we place little, if any, reliance on cases decided under other statutes. We base our conclusion that 1498(b) governs suits against the Smithsonian for copyright infringement on the considerations discussed in Parts II.A. and B. above.

CONCLUSION

We have considered all of O'Rourke's arguments on this appeal and have found them to be without merit. We conclude that the Smithsonian is within the term'"the United States" in 28 U.S.C. § 1498(b). That section waives sovereign immunity with respect to copyright infringement claims brought against the United States, but only to the extent that such claims brought in the United States Court of Federal Calims. Accordingly, we affirm the judgment of the district court, dismissing the present action for lack of subject matter jurisdiction.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

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No. 04-1481

In the Supreme Court of the United States

KEVIN O'ROURKE, PETITIONER

v.

SMITHSONIAN INSTITUTION PRESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Smithsonian Institution is "the United States" for purposes of 28 U.S.C. 1498(b), which vests exclusive jurisdiction over copyright claims against "the United States" in the Court of Federal Claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1061-1081) is reported at 399 F.3d 113. The opinion of the district court (Pet. App. 1a-6a) is reported at 296 F. Supp. 2d 434.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2005. The petition for a writ of certiorari was filed on May 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 28 U.S.C. 1498(b), if a copyright is infringed "by the United States" or by "a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for"

the United States, the copyright holder's "exclusive remedy" is to bring "an action * * * against the United States in the Court of Federal Claims." 28 U.S.C. 1498(b).

2. a. The President of the United States, the Chief Justice of the United States, and the heads of the executive departments "are constituted an establishment by the name of the Smithsonian Institution," 20 U.S.C. 41, which is a "trust instrumentality of the United States," Pet. App. 1064. Established by an Act of Congress in 1846, the Smithsonian was created "for the faithful execution" of the last will and testament of James Smithson, who bequeathed money to the United States "to found * * * an establishment for the increase and diffusion of knowledge among men" (Act of Aug. 10, 1846, ch. 178, 9 Stat. 102); see Pet. App. 1070-1071.

The Smithsonian is managed and largely funded by the federal government. The Smithsonian's affairs are conducted by a seventeen-member Board of Regents. Eight of the regents are *ex officio* high-ranking federal officials: the Vice President, the Chief Justice of the United States, three members of the Senate, and three members of the House of Representatives. See 20 U.S.C. 42. The remaining nine regents are citizens appointed by joint resolution of Congress. 20 U.S.C. 43. The President or, in his absence, the Vice President presides over meetings of the Board. 20 U.S.C. 45.

In addition, the original Smithson trust fund is held and managed by the United States Treasury. Pet. App. 1073. More than two-thirds of the Smithsonian's workforce of 6300 are federal employees, and more than two-thirds of its operating budget is derived from federal appropriations. *Id.* at 1072, 1073. Attorneys from the U.S. Department of Justice represent the Smithsonian when it is sued. *Ibid.* When judgments are entered against the Smithsonian, they

are paid from the United States Judgment Fund, a fund created by Congress to pay judgments entered against the United States. *Id.* at 1073-1074.

b. Congress has authorized "appropriations * * * for" the Smithsonian's "preparation of manuscripts * * * for publications." 20 U.S.C. 53(a). Until it was closed on December 31, 2004, the Smithsonian Institution Press was the publishing arm of the Smithsonian. The Press was not a distinct legal entity, but was an internal division of the Smithsonian. Pet. App. 1065, 1072.[1]

3. Petitioner filed a copyright infringement action in the District Court for the Southern District of New York against the Smithsonian Institution and the Smithsonian Institution Press (together, "the Smithsonian"). Petitioner alleged that he wrote and holds a copyright in a book entitled *Currier and Ives: The Irish and America* (1995), and that the Smithsonian infringed that copyright when it published a book entitled *Currier and Ives: America Imagined* (2001). Pet. App. 2a.

The district court dismissed the case for lack of subject matter jurisdiction. Pet App. 6a. Observing "the close relationship" between the United States and the Smithsonian, the district court concluded that the Smithsonian is "the United States for purposes of Section 1498(b)" and, therefore, that the Court of Federal Claims had exclusive jurisdiction over the action. *Id.* at 3a, 6a (internal quotation marks omitted).

4. The court of appeals affirmed. Pet. App. 1061-1081. The court explained that, although neither Section 1498(b) nor its legislative history expressly mentions the Smithsonian, the Smithsonian's "creation, governance, and

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[1] The Smithsonian now contracts with third parties to produce publications.

operations * * * provide ample indicia that Congress intended § 1498(b)'s reference to 'the United States' to encompass the Smithsonian." Pet. App. 1070. The court rejected petitioner's argument that it should apply the reasoning of *Doug* v. *Smithsonian*, 125 F.3d 877 (D.C. Cir. 1997), cert. denied, 524 U.S. 922 (1998), in which the D.C. Circuit concluded that the Smithsonian was not subject to the Privacy Act. The court explained that, unlike Section 1498(b), which applies to "the United States," the Privacy Act applies only to "agenc[ies]," and therefore that *Doug*, as well as other cases interpreting statutes different from Section 1498(b), provided little aid in determining whether the Smithsonian falls within Section 1498(b). Pet. App. 1075-1080.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals' ruling is the first appellate decision to address whether the exclusive jurisdiction provisions of Section 1498(b) apply to the Smithsonian. Contrary to petitioner's claims, the court of appeals' decision in this case does not conflict with the D.C. Circuit's decision in *Doug* v. *Smithsonian*, 125 F.3d 877 (D.C. Cir. 1997). *Doug* did not involve the question whether the Smithsonian is "the United States" under section 1498(b); the question in *Doug* was whether the Smithsonian is an "agency" under the Privacy Act, 5 U.S.C. 552a. The D.C. Circuit concluded the Smithsonian is not an "agency" because the Smithsonian is not within the Executive branch, is not a corporation, and does not enjoy "substantial independent authority" to "take final and binding action

affecting the rights and obligations of individuals." *Doug*, 125 F.3d at 881. Nothing about that conclusion conflicts with the court of appeals' determination in this case that the Smithsonian is included within the phrase "the United States" as used in Section 1498(b).

2. The court of appeals correctly concluded that the Court of Federal Claims has exclusive jurisdiction over claims that the Smithsonian violated a copyright held by another.

a. Since its establishment in 1846, the Smithsonian Institution has been functionally a part of the federal government. The Treasury holds and manages the Smithsonian's original trust fund. The Vice President and the Chief Justice of the United States, as well as six members of Congress, are members of the Smithsonian's Board of Regents. Two-thirds of the Smithsonian's budget derives from federal appropriations, and two-thirds of the Smithsonian's workforce of 6300 are federal employees. Moreover, the Smithsonian is represented in litigation by the U.S. Department of Justice, and judgments against the Smithsonian are paid from the United States Judgment Fund. 20 U.S.C. 41-43, 45; Pet. App. 1072-1074.

Under these circumstances, the court of appeals correctly concluded that the Smithsonian is part of "the United States" and, accordingly, that the sole recourse for an individual claiming a copyright violation by the Smithsonian is to bring a suit against the United States in the Court of Federal Claims. See *Dolmatch Group, Ltd.* v. *United States*, 40 Fed. Cl. 432, 436 (1998) (treating contract actions against the Smithsonian as claims against "the United States" for purposes of the Tucker Act, 28 U.S.C. 1491(a)); see also *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) (treating the Smithsonian as a "federal agency" for purposes of the FTCA); *Genson* v. *Ripley*, 681

F.2d 1240, 1241-42 (9th Cir.) (same), cert. denied, 459 U.S. 937 (1982); *Expeditions Unlimited Aquatic Enter. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (same), cert. denied, 438 U.S. 915 (1978).

The court of appeals' conclusion also accords with the purpose of Section 1498(b). Under Section 1498(b), only the United States can be sued for copyright violations committed by its employees, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the United States. 28 U.S.C. 1498(b). Thus, Section 1498(b) protects from liability all persons engaged in the production and publication of creative works "for the benefit of the Government." S. Rep. No. 1877, 86th Cong., 2d Sess. 3 (1960) (quoting H. R. Rep. No. 624, 86th Cong., 1st Sess. (1960)). As the court of appeals recognized (Pet. App. 1073), the Smithsonian's publishing operations are performed at the behest of, and for the benefit of, the government. See 20 U.S.C. 53(a). Accordingly, the court of appeals' conclusion that Section 1498(b) encompasses the Smithsonian is entirely consistent with the Congressional purpose underlying the provision.

b. Petitioner nonetheless contends (Pet. 2) that the phrase "the United States" in Section 1498(b) excludes federal trust entities like the Smithsonian, citing a provision in Section 1498(b) authorizing "the head of the appropriate department or agency" to settle copyright infringement claims before litigation. 28 U.S.C. 1498(b). According to petitioner, because this settlement provision applies only to agencies and departments, Section 1498(b)'s reference to "the United States" must also be deemed to include only agencies and departments. Therefore, petitioner contends, because the Smithsonian is neither a department nor an

agency, it does not fall under Section 1498(b)'s jurisdictional provision.

As an initial matter, petitioner did not raise this argument in the district court, and the court of appeals did not address it. This Court should not pass on it in the first instance. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, petitioner's argument lacks merit. By its terms, Section 1498(b)'s jurisdictional provision is not limited to claims for copyright violations committed by agencies and departments; the provision authorizes suits against the United States for infringement committed by any part of "the United States." Had Congress wished to limit the jurisdictional grant to violations committed by agencies and departments, it would have expressly done so, as it did in the settlement provision. See *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004). Under petitioner's reading, moreover, the United States could be sued for copyright infringement committed by any contractor, subcontractor, person, firm, or corporation "acting for the Government," 28 U.S.C. 1498(b), or by any of its agencies or departments; but it could not be sued for violations committed by other governmental entities. Petitioner offers no explanation for that improbable result.

3. Finally, review is inappropriate because the question whether Section 1498(b) applies to the Smithsonian arises only infrequently; apart from this litigation, only one unpublished district court case addresses the issue. See *Brandin* v. *United States*, No. 95-Civ.-2689, 1996 WL 22370, at *7-*8 (S.D.N.Y. Jan. 19, 1996) (concluding that Section 1498(b) includes the Smithsonian). In addition, given the Smithsonian's unique structure and mission, it is unlikely that resolving whether the Smithsonian is covered